Counsel for the Appellants—Macmaster. K.C. (of the Colonial Bar) — Whinney, Agents—Radcliffes & Hood, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C.—Burt. Agents—Maddison Stirling, Humm, & Davies, Solicitors.

HOUSE OF LORDS.

Thursday, July 31, 1913.

(Before Earl Loreburn and Lords Shaw, Mersey, and Parker.)

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY *v.* BENNETT.

(On Appeal from the Court of Appeal in England.)

Revenue—Income Tax—Assurance—Assessment of Profits on Foreign Investments—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, first case.*

An English assurance company, which carried on its business partly in foreign countries, invested its trading balances in the respective countries on the spot either as statutory deposits or to form a local reserve fund. The Crown claimed to tax the interest on such investments as profits within case 1 of Sched. D of the Income Tax Act 1842. The company claimed to be assessed only under case 4 in respect of sums actually received in Great Britain.

Held that the interest and dividends derived from the said investments irrespective of their object formed part of the company's trading profit and were assessable under case 1 of Sched. D.

Decision of the Court of Appeal (1912, 2 K.B. 41) *affirmed.*

The *facts* are shortly stated by Earl Loreburn in his judgment.

Their Lordships' considered judgment was delivered as follows:—

Earl Loreburn—The facts of this case have been found by the proper authority and are not in dispute. The Globe Insurance Company have their head office in England and do fire insurance business, which alone is here material, in the United States, Canada, and Australia. In those countries the Company have made investments, which are of three classes. Class A consists of investments necessarily made to comply with the law of the country, which requires certain sums to be deposited as a condition of doing fire insurance business there. Class B is in the same position, except that these investments must be made as the condition of effecting insurances of a certain amount. Class C consists of investments made voluntarily in each country in order to put the moneys of the company to a profitable use. These sums consist of accumulated profits made in past years, which the directors have invested in high-class securities in order to have a fund easily realisable if required. In all the classes the company receives the dividends upon the sums so invested, but in no case are they specifically remitted to England. They are received abroad by the branch or agency of the company.

As a general rule the liabilities of the company accruing within the United States and Canada can be met out of the profits the company has there, that is to say, the dividends or interest received from the investments in classes A, B, and C, and the premiums earned there, but should extraordinary circumstances arise the company could and would meet the claims upon it by drawing upon its investments. Evidently the same thing applies in Australia, as the moneys were invested there in order to have a fund easily realisable if required.

In these circumstances the Commissioners determined that the investments in question were made in the carrying on of and were part of the company's business transactions, and that the interest on such investments should be included as receipts of the company in arriving at its liability under case 1, Sched. D.

I agree with Hamilton, J., and with the Court of Appeal, in holding that the Commissioners were right. We are not dealing with the fourth case or the fifth case. We are not concerned with the question whether or not the interest or dividends were received in this country, and I say nothing about decisions upon that subject, simply because I do not wish to be diverted from the matter in hand. The only question here is whether the interest and dividends before us are profits or gains of this company's trade, manufacture, adventure, or concern in the nature of trade within the meaning of the first case. I think they are, upon the facts found by the Commissioners—whatever may have been the source from which the invested moneys were originally derived, and whether the investments were compulsory or not. They are, to use the apt expression of Buckley, L.J., in his judgment in this case, the "fruit derived from a fund employed and risked" in a business coming within the statutory description. And the Crown cannot be compelled to proceed under case 4 or 5 if it prefers to proceed under case 1.

An argument was urged upon us on behalf of the company that it should be treated in the same way as an individual; for example, a banker, whose private fortune would be available to pay his banking debts in the last resort, though the annual income from it would not be profits of his banking adventure. An infinite number of illustrations might be given of instances in which part of a trader's income is or is not profit of his trade, and it will be time enough to decide each case when it actually arises. I know of no formula which can discriminate in all circumstances what are and what are not profits of a trade. Probably that is the reason why the statute does not contain a closer definition.

In my opinion this appeal must be dismissed, with costs.

LORD SHAW—The appellants are an insurance company. An elaborate analysis was made before your Lordships of its memorandum and articles of association. But substantially the only relevant matters to be extracted from these documents are that the company does (1) fire business and (2) life business, and (3) it invests its moneys "not immediately required."

All these things are done for the benefit of one body of shareholders. The transactions with regard to them enter the company's accounts, and the profits arising from fire and life business, and the interest arising from investments, all go into these accounts and are computed as making up the balance of the profits or gains of the company's trade.

The facts thus appear to answer, in terms, case 1 of Schedule D of the Income Tax Act. The duties under that schedule are "to be charged in respect of any trade, manufacture, and adventure or concern in the nature of trade not contained in any other schedule of this Act." No other schedule is put forward by the surveyor. And "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains." *Primâ facie* it is difficult to figure a case so plainly covered by a statute.

But it was argued that the investment of funds abroad placed this company in the position of being only liable to be taxed under the fourth case of Schedule D, which covers "the duty to be charged in respect of interest arising from securities" abroad, and that the duty was restricted accordingly to duty upon the amount of interest "received in Great Britain in the current year." It is not necessary to decide whether that case applies or not. The assessment has been laid on, not in respect of it, but has been laid on in respect of the first case in Schedule D, which is applicable to the balance of profit of trade. The argument as to the fourth case therefore drops out, because it is well settled that if a sufficient warrant be found in the statute for taxation under alternative heads the alternative lies with the taxing authority. They have selected case 1. It appears to me that this selection is not only justified in law but is founded upon the soundest and most elementary principles of business.

It was argued, or it appeared to be argued, that this company carried on separate businesses, and that the matter of investments of the company's funds was separate from its business of fire and life insurance. Such companies in the transactions for the year may make little profit, and sometimes considerable loss, on one or other of their fire or life departments, but nevertheless their stability may be maintained, and often the regularity of their profit as a whole is continued by the fact that in the general balance of profits and gains there falls on general accounting principles to be paid in as an item of credit to revenue the interest upon invested funds. The same kind of book-keeping occurs, and properly occurs, whether these funds are invested at home or abroad. Neither in the one case nor in the other are the funds kept nor can they be kept on sound bookkeeping out of the sum total of the profits or gains of the concern. Many cases have been referred to in the courts below, and were referred to in the argument of the appellants. No case contravenes this plain and ordinary principle of accounting. The series of propositions in *Northern Assurance Company* v. *Russell*, 2 Tax Cas. 571, and *Scottish Union and National Insurance Company* v. *Smiles*, 2 Tax Cas. 551, which were formulated as instructions to the Commissioners, cover the present case, and have never been judicially controverted as a convenient guide.

Further, not only was the entire business one business, but in the present instance it was so in a very special sense. Of these investments abroad there were three classes. "A" was the class where the investments were actually required as a condition of the company carrying on insurance business in the United States. This was also the case with class "B" which applied to Canada. With regard to class "C," that consisted of sums which the company in its own interest, and not by reason of any legal obligation, invested in the United States, Canada, and Australia. The Commissioners state, and the fact must be so accepted, that these sums "are available like any other property owned by the company for . . . any other purpose of the company whenever the company may think fit or necessary." There can be no doubt whatsoever that these sums one and all, whether invested in colonies or countries abroad by reason of an obligation to comply with local laws, or as a matter of business to add to the stability of the company, its profit-earning, or its attractiveness to foreign and colonial insurers, were in every sense of the term a business investment—that is to say, an investment in the course of business and for the purpose of business. No accountant, auditor, or actuary could exclude the interest arising from such investments from the category of the earnings and profits of the company. If the company itself attempted to do so it would *quoad hoc* sterilise that portion of the account, compelling the interests from investments not only to be piled up as part of accumulations of capital, but not to be accounted as profits of the business. It would be ceasing to conduct correct accounting, and by the device of treating the interest as no part of the profits of the year it would be, so to speak, treating itself as out of business *quoad* these investments, and as treating the interest upon them as not arising from its own trade. The whole of this argument is a mass of confusion because it is founded upon unreality, the simple fact being that these interests are part of the profits of the company. They are treated as such quite properly in its accounts, and they are divisible as such among its shareholders.

I think the case of *Last* v. *London Assurance Corporation* (10 A. C. 438) applies, but, as already remarked in this particular instance, the most elementary considerations go to show the unity of the concern

and the combination of interest with the other elements of profit or loss in making up the sum of the year's gains. It may not be conclusive that the company's books, kept upon these sound principles, show that the interest was so treated, namely, as part of the annual profits, but as Hamilton, J., remarked in his judgment in this case the balance-sheets are at least "of some use as showing what as a matter of fact is the true and proper way of dealing with these receipts."

I am of opinion that the appeal should be dismissed with costs.

LORD MERSEY—The appellant company has its head office in England, but it carries on part of its fire insurance business in Canada and in the United States of America. In the course of carrying on this part of its business it has invested money in securities in those countries in the circumstances and for the purposes mentioned in the case stated by the Commissioners for Income Tax. The dividends from these securities have been received in Canada and in the United States respectively, and have not been remitted to this country. The question is, whether these dividends are to be taken into account when estimating the balance of profits for the purpose of an assessment to income tax under the first case of Schedule D of the Act of 1842. The first case dealt with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade," and it provides that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern." It is not disputed that the respondents do carry on a trade within the meaning of the first case, nor is it disputed that the profits earned from the fire insurance business in Canada and the United States are to be taken into account when estimating the balance of profits for income tax purposes. But it is said that the dividends from the securities in question are not part of the profits earned in carrying on the business of fire insurance at all; that they are the fruits of money set apart and kept apart from the business, and neither invested nor used in the business. In support of this contention the memorandum of association, which (clause 3) defines the objects for which the company is established, is relied on. These objects are stated to be to carry on the business of fire insurance, of life insurance, of accident insurance, of marine insurance, and other similar businesses, and (sub-clause 18) "to invest the moneys of the company not immediately required in such manner as may from time to time be determined."

It is said that the dividends in question are derived from investments made under this clause (18), and that such investments form no part of the "business" of the company. In my opinion there is no foundation either in fact or in law for this contention. It is well known that in the course of carrying on an insurance business large sums of money derived from premiums collected and from other sources accumulate in the hands of the insurers, and that one of the most important parts of the profits of the business is derived from the temporary investment of these moneys. These temporary investments are also required for the formation of the reserve fund—a fund created to attract customers and to serve as a standby in the event of sudden claims being made upon the insurers in respect of losses. It is, according to my view, impossible to say that the making of such investments do not form part of this company's insurance business, or that the returns flowing from them do not form part of its profits. In a commercial sense the directors of the company owe a duty to their shareholders and to their customers to make such investments, and to receive and distribute in the ordinary course of business, whether in the form of dividends, or in payment of losses, or in the formation of reserves, the moneys collected from them. I make no distinction between the three classes of investments (A, B, and C).

I agree with the judgments in the Courts below, and I think this appeal should be dismissed.

LORD PARKER—The appellant company, whose head office is at Liverpool, carries on the business of fire and life assurance and also the business of granting annuities. Its operations are not confined to the United Kingdom, though in the United States, Canada, and Australia it contracts fire insurance business only. It is admitted, and indeed could hardly be disputed, that all these businesses are trades, or concerns in the nature of trade, within the meaning of case 1 of Schedule D of the Income Tax Act 1842, and that the Crown is entitled to income tax on the annual profits and gains arising therefrom, whether such profits and gains are made within the United Kingdom or abroad. The only question arising on this appeal is whether, for the purpose of computing such profits and gains, the interest and dividends on certain investments of the appellant company in the United States, Canada, and Australia ought to be taken into account. This question is one of fact rather than of law, and ought, in my opinion, to be determined on ordinary business principles, having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the appellant company.

The Case stated by the special Commissioners for the opinion of the Court divides these investments into three classes. . . . The interest and dividends on the investments comprised in all three classes, though received by the appellant company, are not actually transmitted to this country so as to be taxable under case 4 of Schedule D. If they fall to be taxed at all it can only be under case 1, by being brought into account in assessing or computing the profits or gains to be taxed under that case.

With regard to the investments contained in classes A and B, it is, I think, beyond controversy that they were made for the purpose of and are at risk in the company's

fire assurance business, and it appears to me quite clear that under these circumstances the interest and dividends arising therefrom ought, on ordinary business principles, to be brought into account in computing the profits and gains of such business.

With regard to the investments contained in class C, they have been made in order to have a fund easily realisable if required—that is (as I read it) if required for the purposes of the businesses of the appellant company. The income and dividends of these investments are, in fact, treated as receipts on account of these businesses, and dealt with accordingly, and the capital thereof is, and is intended to be, at any time available for the purposes of these businesses. The investments, in fact, constitute a reserve fund, and it is, I think, essential in all such businesses as those carried on by the appellant company that reserve funds of this nature should be accumulated. In my opinion it is impossible to say that such reserve funds are not assets employed in the business for the purposes of which they have been accumulated. I understood the appellant company's counsel to rely on clause 3 (18) of the memorandum of association of the appellant company. In my opinion this clause is not in favour of but against the appellant company's contention. It provides that moneys of the company "not immediately required" may be invested in such manner as might from time to time be determined. Obviously moneys invested under this clause are not withdrawn from the businesses of the company, but are retained for the purposes of such businesses, though temporarily invested, so as not to lie idle. I conclude that in the case of the investments comprised in class C, as well as those comprised in classes A and B, the interest and dividends therefor ought, according to ordinary business principles, to be brought into account for the purposes of ascertaining the profits and gains of the appellant company under case 1.

On these grounds I think that the appeal fails, and should be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—Danckwerts, K.C. — A. M. Latter. Agents — Sharpe, Pritchard, & Co., Solicitors, for Laces & Co., Liverpool.

Counsel for the Respondent — Sir R. Isaacs, K.C. (Attorney-General) — Sir J. Simon, K.C. (Solicitor-General)—W. Finlay. Agent—Solicitor of Inland Revenue.

PRIVY COUNCIL.

Friday, August 1, 1913.

(Before the Right Hons. Lords Atkinson, Shaw, and Moulton.)

JONES *v.* CANADIAN PACIFIC RAILWAY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.)

Reparation — Master and Servant — Negligence — Accident to Servant — Common Employment—Breach of Statutory Duty —Canadian Railway Act (R.S. Canada, cap. 37), sec. 427—Evidence.

In breach of an order of the Board of Railway Commissioners for Canada the respondents allowed a train to be driven by a man who had not passed the required tests, and in consequence (as the appellant alleged) a fellow-servant was killed.

Held that (*a*) the defence of "common employment" was not applicable where there was a breach of a statutory duty on the part of the employer; (*b*) there was evidence to justify the jury in finding that the employee's death was consequent upon the breach of duty.

The *facts* appear from their Lordships' considered judgment, which was delivered by

LORD ATKINSON—This is an appeal and cross-appeal by special leave from a judgment of the Court of Appeal for Ontario dated the 18th June 1912, setting aside the verdict of a jury and the judgment of the High Court of Justice for Ontario entered on the 24th November 1911, and directing that there should be a new trial of the action, or that, in the event of the plaintiff accepting the sum of 2000 dollars paid into Court by the defendants, judgment be entered for the plaintiff for that sum.

The action was brought by the plaintiff, as administratrix of the estate of Gilbert Jones, deceased, for damages under the Ontario statute (R.S.O. 1897, c. 166) corresponding to the Fatal Accidents Act in England, in respect of the death of Gilbert Jones, who was, on the 14th February 1911, killed in a collision at Guelph Junction between a snow-plough belonging to the defendants and a train belonging to the defendants which was standing in a siding at the said junction. A claim was also made under the Ontario Workmen's Compensation for Injuries Act, liability for which was admitted.

This snow-plough is used to clear the railway line of snow. It is a high truck or waggon furnished in front with metal scrapers, which can be raised or lowered by mechanism worked from the inside, and is also furnished with two wings, one on each side, which can by a similar mechanism be spread out or folded to the sides of the waggon as required. The function of the scraper is to lift the snow off the ground; the function of the wings is to throw it, when raised, off the track. The plough is